

In the United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY, a Corporation,
Plaintiff in Error,
vs.

ALICE M. GILLILAND,
Defendant in Error.

No. 1945.

BRIEF OF PLAINTIFF IN ERROR.

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Attorneys for Plaintiff in Error.

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STATEMENT OF THE CASE.

This action was brought by Alice M. Gilliland in the Circuit Court of the United States for the Ninth Circuit, Southern District of California, Southern Division, to recover damages sustained by her while a passenger on one of the trains of the plaintiff in error.

No ground of federal jurisdiction is stated in the complaint beginning at page 5 of the transcript, or in the amendment to the complaint set out on page 18. There is no suggestion of any federal question, nor is there any suggestion of diversity of citizenship, nor is there a suggestion of any other ground of federal jurisdiction.

No question as to the jurisdiction of the federal court was raised in the circuit court. The railway company answered the complaint (see transcript, page 14), the

answer consisting of denials of various allegations of the complaint.

The case was tried, the jury bringing in a verdict for plaintiff in the sum of \$5,000, upon which a judgment was entered (see pages 20 and 21). The Judge declined to sign a bill of exceptions (page 24), whereupon a writ of error was sued out, upon assignments of error set out on page 27 of the transcript.

SPECIFICATION OF ERRORS.

I.

The court erred in not dismissing the complaint for want of jurisdiction.

II.

The court erred in entering judgment for the defendant in error.

ARGUMENT.

It will be unnecessary in this court to do more than suggest the fact apparent on the face of the record that the circuit court was without jurisdiction..

In the case of The Atchison, Topeka and Santa Fe Railway Company v. Frederickson, 177 Fed. 206, this court had before it a case in which it was apparent that the plaintiff had intended to allege diverse citizenship, and meant to make that the basis of federal jurisdiction. In the complaint in that action the plaintiff alleged that he was an inhabitant of the City of Los Angeles, in the County of Los Angeles, State of California. In the case at bar it is a matter of mere surmise on what ground of federal jurisdiction the plaintiff intended to rely. If the intention was to rely upon a federal question no suggestion thereof appears, and we cannot imagine how such a question could arise in this case; and so, too, if the intention was to rely upon diverse citizenship no suggestion of that fact is made.

It has been repeatedly held, as this court held in the Frederickson case, *supra*, that:

“Absence of sufficient averments of diversity of citizenship, or of facts in the record showing such a diversity, is vital; and the defect cannot be waived by the parties, nor can their consent confer jurisdiction.”

It is respectfully submitted that the judgment of the circuit court ought to be reversed and the case remanded with instructions to dismiss.

Dated, April 17, 1911.

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